No. 00-1023

(2)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

RICH HALBMAN,

Petitioner,

v.

ST. LOUIS COUNTY, MISSOURI, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS ST. LOUIS COUNTY AND W. DUDLEY McCARTER, TRUSTEE

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COUNTER-STATEMENT OF QUESTION PRESENTED

Respondents respectfully suggest that the issue framed by petitioner is more accurately stated as follows:

Did the Eighth Circuit Court of Appeals correctly affirm the decision of the district court dismissing Halbman's second amended complaint where the complaint fails to state a claim for relief, the claims are barred by traditional res judicata principles, the claims are inextricably intertwined with the state court judgment, and Halbman, who is in privity with the state court plaintiffs and had ample opportunity to bring his claims in state court, awaited the state court's adverse ruling before attempting to bring his substantively identical challenge in federal court?

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STATEMENT OF THE CASE

After extensive litigation in the state courts by parties closely aligned with Petitioner Halbman, the disincorporation of Peerless Park became effective in May of 1999. Pet. App. 16a. The former city is now a part of St. Louis County, Missouri ("County"). *Id.* Halbman, an official of the city at the time of its disincorporation, appeals the decision of the United States Court of Appeals for the Eighth Circuit finding that the *Rooker-Feldman* doctrine bars this federal action to void the disincorporation because Halbman's federal claims are inextricably intertwined with the state court judgment. Pet. App. 2a-13a. *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 476 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923).

A. Lemonds' and Halbman's Federal Court Action. Shortly after the Missouri Court of Appeals issued its order affirming the state trial court decision upholding the disincorporation, Rich Lemonds brought this federal action to reverse the disincorporation. Pet. App. 4a, 16a, 34a-35a. The state appellate mandate was issued one week after this action was commenced. Pet. App. 16a. One week after the mandate issued, the first amended complaint was filed listing Halbman as an additional plaintiff. The next day, before hearing evidence on Lemonds' motion for a preliminary injunction, the district court struck the first amended complaint. On June 9, 1999, the district court denied Lemonds' motion for a preliminary injunction. That same day, the district court granted leave to file the second amended complaint adding Halbman as a plaintiff. Both Lemonds and Halbman were city officials of Peerless Park up until its dissolution, and they were well aware of the state

proceedings. Pet. App. 12a. Lemonds himself sponsored the bill to hire an attorney for the city in the state court litigation and received regular reports of the progress of the case. Pet. App. 12a-13a. Yet, rather than pursuing their claims before the state court, Lemonds and Halbman awaited that court's adverse ruling before attempting to challenge the disincorporation in federal district court. Pet. App. 13a.

The federal complaint alleged that the statutory scheme permitting disincorporation without an election violates both the First Amendment and the equal protection clause, in that the secrecy of the petition process effectively "silenced" them, suppressing "core political speech" by preventing them from conveying a political message against the disincorporation of the city. Pet. App. 8a. In addition, because qualified but unregistered voters were not counted toward the total number of city residents for purposes of determining whether the requisite signatures of two thirds of the population had been recorded, Lemonds and Halbman rely on the equal protection clause to argue that the secret petition process denied them an "equal opportunity to win votes." Pet. App. 8a.

B. The City Officials' State Court Action. Like the federal complaint, the state complaint challenged the constitutionality of the statutory scheme permitting disincorporation without an election. In addition to raising state law arguments not at issue in this federal action, the former city and several of its former officials ("state plaintiffs") sought to invalidate the County's disincorporation order in state court on the basis of the federal due process clause. Pet. App. 4a, 6a. The complaint alleged

that section 79.495 R.S. Mo.[1] violates federal substantive and procedural due process principles by failing to ensure that all residents of a fourth class city receive adequate notice prior to the circulation of a disincorporation challenge. *Id.* The state court upheld the constitutionality of the statute, found that Lemonds was not a voter under Missouri law because he was not registered to vote, and found that the statute's requirements had been met. Pet. App. 28a-31a. Resolving the federal constitutional challenge, the state court held:

> Because relators have no "life, liberty or property" interest in the continued existence of Peerless Park, *Hunter v. Pittsburgh*, 207 U.S. 161, 52 L. Ed. 151, 28 S. Ct. 40 (1907) there is no constitutional right to notice or a hearing. State law provides, and Relators received, more process than Relators were due. There is no constitutional right to vote on disincorporation of a fourth class city.

Pet. App. 28a.

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1. Section 79.495, R.S. Mo. (1994) provides:

> Disincorporation without election allowed, when. — The county governing body of any county in which a city of the fourth class is located shall have the power to disincorporate such city upon petition of two-thirds of the voters of such city, without an election in such city, provided that the petition requests disincorporation without an election, and provided that the population of such city is less than one hundred.

C. The Decisions of the Federal District Court and Court of Appeals. On June 9, 1999, the federal district court denied Lemonds' request for a preliminary injunction to void the disincorporation. On October 15, 1999, the court dismissed all of Lemonds' and Halbman's claims with prejudice. Pet. App. 14a. The court found that the complaint failed to state a claim upon which relief could be granted and the suit was barred by res judicata principles and the *Rooker-Feldman* doctrine. *Id.* The Court of Appeals affirmed, finding that *Rooker-Feldman* bars the federal claims. Pet. App. 2a-13a.

Turning to the federal complaint, the Court of Appeals noted that the relief sought — to enjoin the disincorporation of Peerless Park — would directly nullify the final judgment of the state court upholding disincorporation. Pet. App. 7a. In addition, the Court of Appeals found that the federal complaint did no more than restate the claim for relief that was rejected on the merits by the state court, noting that "both suits challenge the basic fairness of the petition process based on the concept of lack of notice" and "the first amendment and equal protection arguments presented to the district court appear to be nothing more than creative attempts to reclothe the failed due process claim in new constitutional garb." Pet. App. 8a. Therefore, "a decision favorable to appellants could 'only be predicated upon a conviction that the state court was wrong.' *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 25 (1987) (Marshall, J. concurring)."

Turning to the parties, the Court of Appeals noted that "the key inquiry, as always, must be whether the federal plaintiff's interest in having a state rule set aside is inseparable from his interest in upsetting a particular state court judgment based on that rule. *See Feldman*, 460 U.S. at

482-486." Pet. App. 11a. Applying this principle, the Court of Appeals decided that Lemonds' and Halbman's claims are inextricably intertwined with the state court judgment because their general constitutional challenge to section 79.495 "is inseparable from their desire to reverse the disincorporation of Peerless Park," and, "because the entire upshot of a favorable decision in this case would be to unwind the decision of the state court, granting the requested relief would have only retrospective effect." Pet. App. 12a. The Court of Appeals also noted that Lemonds and Halbman had ample opportunity to bring their first amendment and equal protection claims in state court, but awaited that court's adverse ruling before attempting to bring their substantively identical challenges in federal district court. Pet. App. 12a-13a.

REASONS FOR DENYING THE WRIT

Because Halbman is in privity with the state plaintiffs and had ample opportunity to participate in the state action, the judgment does not raise the broad question that Halbman sets forth in his Petition — whether the court below erred in applying the *Rooker-Feldman* doctrine to a nonparty. This Court "reviews judgments, not statements in opinions." *Black v. Cutter Laboratories*, 351 U.S. 292, 297 (1970) That the Court of Appeals decided that the *Rooker-Feldman* doctrine bars the claims of a nonparty who had ample opportunity to bring his claims in state court and awaited the state court's adverse ruling before attempting to bring his substantively identical challenge in federal court is mere fortuity; it could as easily have held that this case is barred by traditional res judicata principles or that the petition fails to state a claim for relief because Halbman's constitutional arguments are flawed. Because Halbman's claims are barred

by traditional res judicata principles and his First Amendment and equal protection arguments are flawed, the *Rooker-Feldman* issue is not outcome determinative. Moreover, the decision correctly applies the principles set forth in this Court's decisions in *Rooker* and *Feldman* to the particular facts of this case in finding that Halbman's federal claims are inextricably intertwined with the state court judgment. Because Halbman is in privity with the state plaintiffs and had ample opportunity to participate in the state action, this case is not the appropriate vehicle to resolve whether the *Rooker-Feldman* doctrine applies to a nonparty to an earlier state action. Therefore, this Court should deny Halbman's Petition for Certiorari.

I. CERTIORARI SHOULD BE DENIED BECAUSE THE *ROOKER-FELDMAN* ISSUE IS NOT OUTCOME DETERMINATIVE

A. Because Halbman's First Amendment and Equal Protection Arguments are Flawed, the Federal Complaint Fails To State a Claim For Relief

In the Second Amended Complaint, Halbman asserts a constitutional right either to vote on the city's disincorporation or to advance notice of the petition for disincorporation, so that he might have registered to vote and then be counted in the numerical calculation of whether there were sufficient signatures on the petition to constitute the two-thirds required by the applicable Missouri statute, § 79.495 R.S. Mo. (1994). Pet. App. 8a. The district court correctly dismissed the complaint for failure to state a claim because Halbman did not have any constitutional right to vote on the disincorporation or to notice that a petition was being circulated.

Halbman's equal protection arguments are flawed. As noted by the district court, no form of discrimination requiring strict scrutiny is present under the facts of this case. Pet. App. 19a. The procedure set forth in 79.495 for disincorporating a small fourth class city upon petition of two thirds of the registered voters cannot be equated with an election, since registered voters who oppose the petition are not required to go to the polls to cast their ballot. In the non-election procedure set forth in 79.495, the lack of notice has no effect on the voting rights of the electors, since registered voters who do not sign the petition are counted as "no" votes. Any burden on voters' choice is borne only by those who fail to register to vote until after a petition for disincorporation is circulated and filed with the County.

The appropriate balancing test for voting regulations is set forth in *Burdick v. Takushi*, 504 U.S. 428 (1992):

> A regulation must be narrowly drawn to advance a state interest of compelling importance only when it subjects the voters' rights to "severe" restrictions. But when a state election law provision imposes only reasonable, nondiscriminatory restrictions upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions.

Id. at 434 (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788-89 (1983).

Since it is relatively easy to register to vote, the registration requirement in the non-election procedure set forth in 79.495 is reasonable and is similar to the brief

residency requirement which was found to be permissible in *Marston v. Lewis*, 410 U.S. 679 (1973) (50 day residency requirement permits county recorder time to certify correctness and completeness of registrations). Missouri's voter registration requirement serves the important purpose of providing a speedy and efficient means for determining whether a petition for disincorporation satisfies the two-thirds super majority requirement of 79.495 and eliminates the confusion and increased opportunities for voter fraud which would inevitably result from lengthening the "window of opportunity" to accommodate persons who claim to be eligible voters, but who did not bother to register. Applying the balancing test set forth in *Burdick*, the state's interest in providing a speedy and administratively efficient method for disincorporating a small fourth class city where two-thirds of its voters seek to dissolve it outweighs Halbman's limited interest in waiting until the eleventh hour to register to vote.

Likewise, Halbman's First Amendment arguments are flawed. There is nothing in 79.495 which reduces the voices available to convey political messages or which reduces the size of the audience. Halbman was free to communicate his political views and to circulate a petition or conduct a voter registration drive. Since 79.495 does not restrict core political speech or impose severe burdens on speech or association, there is nothing to trigger the strict scrutiny test applied in *Buckley v. American Constitutional Law Foundation*, 119 S. Ct. 636 (1999); *See Dobrovolny v. Moore*, 126 F.3d 1111 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 1188 (1998) (there was no First Amendment violation because appellants' inability to know in advance the exact number of signatures required in order to place their initiative measures on the ballot in no way restricted their ability to circulate petitions or otherwise engage in political speech.) A requirement that

the petition circulators present the petition to their opponents would inhibit the freedom of circulators to engage in one-on-one association with those who share their same goals and ideals. Such a requirement would be the kind of "required speech" that violates the First Amendment. *See Buckley* (where the state's name badge requirement was invalidated). Moreover, the additional time and other resources made necessary by such a requirement would restrict the number of individuals capable of circulating petitions. Such a restriction would reduce the number of voices who could convey the messages of the proponents and opponents of disincorporation and thus violate the First Amendment. *See Meyer v. Grant*, 486 U.S. 414 (1988) (petition circulation is "core political speech" for which First Amendment protection is "at its zenith"); *Buckley*, 525 U.S. at 182 (restrictions which limit the number of voices which will convey the petition circulator's message are subject to exacting scrutiny under the First Amendment.) If 79.495 resulted in any burden on Halbman's First Amendment rights, the proper level of scrutiny is the balancing test set forth in *Burdick*. Applying the *Burdick* test, the state's interest in providing a speedy and administratively efficient method for disincorporating a small fourth class city outweighs Halbman's limited interest in waiting until the eleventh hour to conduct a voter registration drive or otherwise convey his opposition to the disincorporation.

Because Halbman's complaint fails to state a claim for relief, the *Rooker-Feldman* issue is not outcome determinative. Accordingly, this Court should deny Halbman's Petition for Certiorari.

B. Because Halbman is in Privity with the State Plaintiffs and had Ample Opportunity to Participate in the State Court Action, the Federal Claims are Barred by Traditional Res Judicata Principles

The Full Faith and Credit Statute, 28 U.S.C. § 1738 (1994), requires that federal courts give state court judgments the same preclusive effect that such a judgment would be given in the courts of the state rendering the judgment. *Allen v. McCurry*, 449 U.S. 90, 96 (1980). Thus, it is necessary to look to state law to determine the preclusive effect of the final state court judgment. The Missouri courts recognize that when two lawsuits present the same cause of action, res judicata precludes consideration of matters that were actually decided and matters that could properly have been raised and decided in the earlier lawsuit. *King Gen. Contr., Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 501 (Mo. 1991). In order to have identity of the cause of action, the actions do not have to be identical, but the claims must have arisen out of the same act, contract or transaction. *Missouri Real Estate and Insurance Agency, Inc. v. St. Louis County*, 959 S.W.2d 847, 850 (Mo. App. 1997). This case presents the same cause of action as the state court litigation because both cases seek to redress the same alleged wrong — the disincorporation of Peerless Park without an election and without prior notice to voters. As noted by the Court of Appeals, the First Amendment and equal protection arguments presented to the district court appear to be nothing more than creative attempts to reclothe the failed due process claim in new constitutional garb. Pet. App. 8a.

In the Missouri courts, a final judgment disincorporating a city cannot be collaterally attacked by anyone, even by persons who were not parties in the proceeding. *See Cherry v. City of Hayti Heights*, 563 S.W.2d 72 (Mo. Banc 1978) (holding that the county court's finding that a petition for incorporation was filed in accordance with statute was conclusive in subsequent collateral attack by private individual who was not a party to the earlier proceeding.) Moreover, under the principles of virtual representation applied by the Missouri courts, Halbman is bound by the state court's rejection of the constitutional challenge to 79.495. *See Drainage Dist. No. 1 Reformed, of Stoddard County v. Matthews*, 234 S.W.2d 567, 361 Mo. 286 (Mo. 1950) ("*Drainage District*") (The doctrine of virtual representation is applicable, with respect to defense of res judicata, if the interest of the represented and the representative are so identical that the inducement and desire to protect the common interest may be assumed to be the same in each and if there can be no adversity of interest between them.); and *Seibert v. City of Columbia*, 461 S.W.2d 808 (Mo. Banc 1970) (Absent fraud or bad faith, all residents and taxpayers must be bound by result of litigation of public nature carried on by one in similar circumstances and having a common interest.) The city officials who were plaintiffs in the state court action had the same interest as Halbman in voiding the disincorporation. In the Missouri courts, Halbman's federal claims are barred by traditional res judicata principles.

The application of Missouri preclusion principles to Halbman does not violate the due process clause of the Fourteenth Amendment. Because of Halbman's virtual representation by the state plaintiffs, Halbman has vicariously had his day in court. As this Court noted in

Richards v. Jefferson County, 517 U.S. 793, 797 (1996), there is an exception to the general rule that res judicata principles only apply to parties to a judgment when there is "privity" between a party to the second case and a party who is bound by the earlier judgment. *Id.* at 798. Although there are constitutional limits on the "privity" exception, the term "privity" is now used to describe various relationships between litigants that would not have come within the traditional definition of that term. *Id.* Constitutional principles do not require one to have been a party to a judgment in order to be bound by it where one's interests are adequately represented by someone with the same interest who is a party. *Id.* Adequacy of representation is best viewed in terms of incentive to litigate. *See Tyus v. Schoemehl*, 93 F.3d 449, 455-56 (8th Cir. 1996), *cert. denied*, 117 S. Ct. 1427 (1997). No one could have a stronger incentive to reverse the disincorporation than the former city, its mayor and two of its aldermen. *See* Pet. App. 35a. Halbman was adequately represented by, and thus in privity with, the state plaintiffs. *See Tyus*. Therefore, application of Missouri preclusion principles to Halbman falls squarely within the privity exception set forth in *Richards*.

Although virtual representation may be used in the private law context, its use is particularly appropriate for public law issues. *Tyus* at 456. In public law cases, the number of plaintiffs with standing is potentially limitless. If parties were allowed to continually raise issues already decided, public law claims "would assume immortality." *Id.* There is another important consideration: in the public law context, if the plaintiff wins, by definition, everyone benefits. Holding preclusion inapplicable in this context would encourage fence-sitting, because nonparties would benefit, if the plaintiffs were successful but would not be penalized

if the plaintiffs lost. *Id.* If the state plaintiffs had prevailed, all of the opponents of disincorporation would have benefitted. Without virtual representation, a loss by the state plaintiffs would cause no harm to Halbman and the other opponents of disincorporation who chose not to participate in the state court action. In such a situation, there is no incentive to intervene, *See Tyus* at 457. As noted by the Court of Appeals, Halbman was well aware of the state proceedings and had ample opportunity to participate. Pet. App. 12a. Halbman should not be given the chance to obtain a second determination simply because he chose to be a "fence sitter."

Because Halbman is in privity with the state plaintiffs and had ample opportunity to participate in the state court action, the federal claims are barred by traditional res judicata principles. The *Rooker-Feldman* issue is not outcome determinative. Halbman's Petition for Certiorari should be denied.

II. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE IS NOT THE APPROPRIATE VEHICLE TO RESOLVE WHETHER THE *ROOKER-FELDMAN* DOCTRINE APPLIES TO A NONPARTY

Because Halbman is in privity with the state plaintiffs and had ample opportunity to participate in the state action, the judgment does not raise the broad question that Halbman sets forth in his Petition — whether the court below erred in applying the *Rooker-Feldman* doctrine to a nonparty. The decision of the Court of Appeals correctly applies the principles set forth in this Court's decisions in *Rooker* and *Feldman* to the particular facts of this case in finding that Halbman's federal claims are inextricably intertwined with

the state court judgment and that Halbman, who was well aware of the state proceedings and awaited that court's adverse ruling before attempting to challenge the disincorporation in federal district court, had ample opportunity to bring his substantively identical challenge in state court. This case does not, as Halbman claims, raise grave issues concerning a nonparty's right to a day in court under the due process clause of the Fourteenth Amendment. (Petition, p. 10) Halbman was adequately represented by, and thus in privity with, the officials of the former city who brought the state court action. *See Richards*, 516 U.S. at 798. Because Halbman was in privity with the state plaintiffs, Halbman vicariously had his day in court. This case is not the appropriate vehicle to resolve whether the *Rooker-Feldman* doctrine applies to a nonparty to an earlier state court action.

Halbman argues that the view taken by leading commentators and several circuits is that the *Rooker-Feldman* doctrine should be narrowly construed to reduce the occasions that require a federal court to give greater effect to a state judgment than would be recognized in the state courts. Petition, at 17. Even under the narrow view proposed by Halbman, his claims are barred by *Rooker-Feldman* since his claims are barred by traditional res judicata principles applied by the Missouri courts. *See Drainage District*, *Seibert* and *Cherry*. This case is not the appropriate vehicle to resolve whether the *Rooker-Feldman* doctrine is coextensive with preclusion or extends beyond it. The Petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny Halbman's Petition for Writ of Certiorari.

Respectfully submitted,

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